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No. 89-433

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DIRECTOR OF REVENUE, STATE OF MISSOURI,
Petitioner,

vs.

FREDERICK AND JOSEPHINE HACKMAN,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Missouri

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The only issue raised by the decision of the Missouri Supreme Court in the case sought to be reviewed is, when a state income tax statute is found to violate 4 U.S.C. 111, whether a state is permitted to refund taxes as a remedy, or if the state courts must first consider if a federal court would impose that remedy or another.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iv
Statement of the Case	1
Argument	3
I. Petitioner's reliance on 28 USC 1257 is misplaced because the decision below is based only upon adequate state grounds.	3
II. The cause has been rendered moot by subsequent action of the Missouri General Assembly and Governor to provide funding for the state income tax refunds, and payment of refunds for the 1988 tax year	4
III. Petitioner's reliance upon the principles of *Chevron Oil v. Huson* is misplaced	5
Conclusion	7
Appendix	A-1

TABLE OF AUTHORITIES

Page

Cases:

American Trucking Association v. Smith, No. 88-325 .. 4

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 4

Chevron Oil v. Huson, 404 U.S. 97 (1971) 5,6

Community Federal Savings & Loan Assoc. v. Director of Revenue, 752 S.W.2d 794 (Mo. banc 1988)..... 6

Davis v. Michigan Department of Treasury, ____ U.S. ____; 109 S.Ct. 1500 (1989) 1,3,4,5,6

General Motors Corp. v. Washington, 377 U.S. 436 84 S.Ct. 1564 (1964) 4

Hackman v. Director of Revenue, 771 S.W. 2d 77 (Mo. banc 1989)..... 1

Homestake Lead v. Director of Revenue, 759 S.W.2d 847 (Mo. banc 1988) 6

Klinger v. Missouri, 80 U.S. 257 (1872)..... 3

McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, No. 88-192 4

Tyler Pipe Industries v. Washington Department of Revenue, ____ U.S. ____; 107 S.Ct. 2810 (1987)... 4

Statutes:

4 U.S.C. 111 .....i,1,3,5,6

28 U.S.C. 1257 3

Section 143.801 Rev. Stat. Mo. (1986) 2,3

Section 206.30 (1) (f) Michigan Comp. Laws Annot. (Supp. 1988) 1

S.B. 2, 1st Extra Session, 85th Mo.Gen.Ass. (1989) 5,A-1

Other Authorities:

Annotation, Dual Ground for State Decision, 59 L.Ed. 2d 924 3

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STATEMENT OF THE CASE

On March 28, 1989 this Court struck down as violative of the principles of inter-governmental tax immunity, codified fifty (50) years ago at 4 USC Section 111, a portion of the Michigan Income Tax Act, Section 206.30(1)(f) Mich. Comp. Laws Anno. (Supp.1988) which exempted from taxation retirement benefits paid by the state or its political subdivisions, but taxed retirement benefits paid by other employers, including the federal government, *Davis v. Michigan Department of Treasury,* ____ U.S. ____; 109 S.Ct. 1500 (1989). The present case, *Hackman v. Director of Revenue,* 771 S.W. 2d 77 (Mo.banc 1989) addressed two issues: whether this Court's decision in *Davis* affected Missouri income tax provisions which

were similar to those in Michigan; and whether relief was available in the form of income tax refunds to individual federal pensioners under Missouri law.

On May 25, 1989, the Supreme Court of Missouri held, as petitioner had conceded, that Missouri's practice of exempting most state and local pensions from Missouri income tax, while taxing federal pensions was violative of 4 U.S.C. 111 and therefore unlawful under this Court's holding in *Davis*. The Supreme Court of Missouri also held that under the applicable provision of the Missouri income tax laws, Section 143.801 RSMo 1986, that respondents herein were entitled to refunds of the Missouri income taxes paid on the federal pensions they had received.

Between the date of this Court's decision in *Davis*, and the Supreme Court of Missouri's decision in the instant case, the Missouri General Assembly amended the appropriate provisions of the Missouri statutes to eliminate *in futuro* the invidious distinctions previously drawn between the income tax treatment of state and local government retirees and federal retirees. Subsequent to the Missouri Supreme Court's decision in the instant case, the Governor called the General Assembly into special session for the purpose of generating additional revenue to fund the refunds provided by Section 143.801. (Appendix, p. A-1)

In August, petitioner herein, the Director of Revenue for the State of Missouri, issued refunds to federal pensioners for the 1988 tax year, and announced a program for refunds of taxes paid in prior years, which will be completed by the end of 1990.

Subsequently, petitioner filed his petition for a writ of certiorari with this honorable Court.

ARGUMENT

I.

Petitioner asserts that this Court has jurisdiction to review the decision of the Missouri Supreme Court pursuant to 28 USC Section 1257, (Pet. p.2), but offers no explanation thereof. There is no basis in the record for this Court's jurisdiction thereunder. Petitioner's reliance on 28 USC 1257 as the source of this Court's jurisdiction in the instant case is misplaced, because the decision of the Missouri Supreme Court is based solely upon adequate state grounds.

Petitioner conceded below that *Davis v. Michigan Department of Treasury* ___ U.S. ___; 109 S.Ct. 1500 (1989), controlled whether or not Missouri's income tax treatment of state, local, and federal retirement benefits violated the principles of inter-governmental immunity as codified fifty (50) years ago at 4 USC Section 111, and further conceded that the Missouri Income Tax statutes were defective in that regard.

The only issue contested before the Missouri Supreme Court, and the only issue available for review before this Court, is whether or not a remedy was available to respondents for taxes already paid. In answer to this question, the Missouri Supreme Court looked to Missouri state law, specifically Section 143.801, RSMo 1986, and determined the Missouri General Assembly had provided for refunds to persons in respondents' circumstances. No other basis for relief was cited by the Missouri Supreme Court in its decision.

The principle is well established that this Court will not review state court decisions where those decisions are based on adequate state grounds. *Klinger v. Missouri,* 80 U.S. 257 (1872); *See, Annot., Dual Grounds for State Decision,* 59 L.Ed.2d 924. This is particularly true in a number of recent cases involving the invalidity of state taxes.

In *Tyler Pipe Industries v. Washington Department of Revenue*, ____ U.S. ____; 107 S. Ct. 2810, 2822 (1987), this Court found that the manufacturing tax imposed by the State of Washington violated the Commerce Clause.[1] This Court remanded the case to the Supreme Court of Washington to determine whether or not there were state law remedies which would obviate the need for application for federal remedies. Likewise, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984), this Court declined to impose a particular remedy, but remanded the case back to the Supreme Court of Hawaii for examination of remedies available under state law. In *Davis* itself this Court noted with seeming approval the Michigan concession that refunds were due its federal retirees under state law *Davis, supra* at 1508. Petitioner does not seek a re-examination of *Davis*. Petitioner does not contend that the federal law has been misapplied in the case at bar. Respondents do not contend that the remedy provided by the state of Missouri is inadequate. The only contention made by petitioner is that the state refund relief is precluded by federal court decisions. Respondents have found no precedents for this assertion, and none are cited by the petitioner. The converse of this question may be decided by this Court in the presently pending cases of *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, No. 88-192, and *American Trucking Association, Inc. v. Smith*, No. 88-325, but those decisions can have no direct application to the present case. The petition for certiorari should be denied.

II.

After the decision of the Missouri Supreme Court was announced on May 25, 1989, the Governor of the State of Missouri issued a call for a special session of the General Assembly to adopt measures to provide tax revenues to pay for

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[1] That same tax had earlier been held to be constitutional by this court in *General Motors Corp. v. Washington*, 377 U.S. 436 (1964).

the refunds ordered by the Missouri Supreme Court decision in this case. Reproduced in the Appendix is Senate Bill No. 2 which was adopted by the General Assembly, and approved by the Governor on July 11, 1989. Section A, the emergency clause of the bill, recites specifically that the purpose is to fund the refunds due to federal retirees. Further, petitioner has paid all 1988 refund requests based upon this decision, and has announced that the 1987 tax year refunds will be paid in the next ninety (90) days.

Respondents suggest to this Court that the actions of the Governor, Missouri General Assembly, and petitioner himself demonstrate that there remains no justiciable case or controversy between the parties. For this reason, the petition for certiorari should be denied.

III.

Even if the Missouri Supreme Court had applied the analysis set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), as urged by petitioner, the result in this cause would have been no different. Petitioner's invocation of the *Chevron* test is grounded on a skewed statement of the facts.

A.

Petitioner asserts that the decision in *Davis* was not foreshadowed. *Davis* was decided under principles of inter-governmental immunity, codified fifty (50) years ago in 4 USC Section 111. While there is little appellate court writing construing that statutory section (Of five decisions cited by petitioner in footnote 2 at page 11 of the Petition, four are administrative decisions of state agencies, and only one is an appellate court decision), the history of state/federal inter-governmental immunity prior to codification is extensive. It can hardly be contended that the *Davis* decision was not foreshadowed when the entire history of federal/state tax immunity is examined.

B.

Likewise the argument that refunds will not further the purpose of *Davis* overlooks a substantial, material fact. Petitioner estimates that $150,000,000 (Appendix to Petition, p. A-11) will be refunded to federal retirees. If that figure is accurate, and if federal pensioners on average pay 20% federal income taxes, an additional $30,000,000 will flow into federal coffers as a result of the refunds. $30,000,000 is the amount of wages paid to state and local Missouri employees in the past three years out of the federal treasury. To the extent those monies are reimbursed, the purpose of *Davis* is served.

C.

Finally, petitioner asserts that refunds would impose an undue hardship on the State, if the analysis of *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971) is applied. However, the General Assembly of Missouri has made it state policy to refund unlawfully collected taxes. That provision has cost the State tens of millions of dollars as a result of the *Community Federal Savings & Loan Assoc. v. Director of Revenue,* 752 S.W. 2d 794 (Mo banc 1988) and *Homestake Lead v. Director of Revenue,* 759 S.W. 2d 847 (Mo banc 1988) decisions prior to the decision in the present case. The General Assembly has raised the money to pay the refunds. (Appendix A). It is not clear why refund of tens of millions of dollars to corporate taxpayers does not pose a hardship, but refunds of relatively small amounts to many small taxpayers does present a hardship. If petitioner's *Chevron* argument is accepted, the effect thereof in Missouri will be that 4 U.S.C. 111 only became effective when this Court decided *Davis,* fifty (50) years after 4 U.S.C. 111 was originally enacted. The petition for certiorari should be denied.

CONCLUSION

WHEREFORE, respondents respectfully suggest to this Court that there is no jurisdiction to entertain the petition for certiorari; that there is no justiciable controversy between the parties as a result of actions subsequent to the decision of the Missouri Supreme Court in this case; and that this Court's valuable and limited resource of time can better be devoted to cases in which petitioner is more likely to prevail on the merits. Respondents respectfully request that this Court deny the petition for certiorari herein.

Respectfully submitted,

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APPENDIX

APPENDIX

FIRST EXTRAORDINARY SESSION
[TRULY AGREED TO AND FINALLY PASSED]
HOUSE COMMITTEE SUBSTITUTE FOR

SENATE BILL NO. 2

85TH GENERAL ASSEMBLY

AN ACT

Relating to taxation, with an emergency clause and an expiration date for one section.

Be it enacted by the General Assembly of the State of Missouri as follows:

Section 1. 1. Beginning October 1, 1989, an addition to the state sales tax of one-fifth of one percent is levied and imposed upon all sellers for the privilege of selling tangible personal property or rendering taxable services at retail in this state upon all sales and services which now are or hereafter are listed and set forth in sections 144.010 to 144.525, RSMo. Beginning October 1, 1989, an addition to the state use tax of one-fifth of one percent is levied and imposed for the privilege of storing, using or consuming within this state any article of tangible personal property as set forth and provided in sections 144.600 to 144.745, RSMo. Except as to the amount of the tax, the provisions of chapter 144, RSMo, and the rules and regulation promulgated pursuant to chapter 144, RSMo, shall apply to the levy and collection of the additional taxes imposed by this section. The additional tax imposed under the provisions of this section shall not be levied after June 30, 1990, unless

authorized by the qualified voters of this state.

2. This section shall expire July 1, 1990.

Section 2. 1. For all tax years beginning on or after January 1, 1990, but none after December 31, 1991, the income tax rate for corporations provided in section 143.071, RSMo, shall not apply to the Missouri taxable income of corporations. For all tax years beginning on or after January 1, 1990, but none after December 31, 1991, a tax is imposed upon the Missouri taxable income of corporations in an amount equal to the following percentages of Missouri taxable income.

Taxable income:	Tax
Not over $100,000	5%
Over 100,000 but not over $335,000	6%
Over $335,000	6 ½%

2. All provisions of chapter 143, RSMo, relative to the levy, collection and administration of corporation income taxes shall apply to the tax imposed by this section, however, the amount of any tax imposed by this section above the amount prescribed by section 143.071, RSMo, shall not be an allowable credit pursuant to section 148.030, RSMo.

Section 3. The director of the department of revenue shall make an estimate of the amount of tax revenues generated under the provisions of this act. The director of the department of revenue shall also make a separate accounting of the amount of income tax refunds and reduced individual income tax revenues necessitated by decisions of the Supreme Courts of the United States and the state of Missouri, relating to taxation of pension benefits. If the director of the department of revenue determines the amount of revenues finally generated under the provisions of this act exceeds the amount of individual income taxes collected on United States government retirement benefits and any interest accruing thereon, which the state is obligated to refund and the amount of reduced individual

income tax revenues pursuant to the decisions of the Supreme Courts of the United States and the state of Missouri, he shall deposit the excess amount into the budget stabilization fund created pursuant to section 33.285, RSMo. The director of the department of revenue shall quarterly submit in writing a report to the senate and the house of representatives, and the commissioner of administration, describing the methodology used in arriving at the estimate of the amount of tax revenues generated under the provisions of this act, and the amount of income tax refunds and reduced individual income tax revenues issued to taxpayers pursuant to the Supreme Court's decisions.

Section A. Because of the need to raise revenue to satisfy the requirements imposed upon the state by decisions of the Supreme Courts of the United States and of Missouri for refunds of certain income tax collections, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

/s/ Jim Mathewson
President of the Senate

/s/ Bob F. Griffin
Speaker of the House of Representatives

Approved this 11th day of July, 1989

/s/ John Ashcroft
GOVERNOR